88, 41 Sup. Ct. 31. That case held that a public warehouse, in which the plaintiff had leased a room, was an extension of his dwelling, and not within the prohibition of the Act. Mr. Justice McReynolds dissented in the instant case because it was indistinguishable from the *Street* case. His position is hard to assail. To hold a public warehouse contributory to the dwelling of every person who has leased a room in it is a fiction out of harmony with the provision that the Volstead Act "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." See (1919) 41 Stat. 305, 308. If, however, the *Street* case is good law, there is little reason for reaching a different conclusion when the liquor is in a government bonded warehouse. In the latter case the government has a claim on the liquor, whereas in the *Street* case the plaintiff had exclusive ownership. But the government's only claim on bonded liquor is for taxes due, and they were tendered here. It was contended in the *Street* case that it was unfair to discriminate against those not having storage facilities in their dwellings. While this argument has force, the Volstead Act does not provide for such a situation. See (1919) 41 Stat. 315, 317. It appears that the *Street* case set a precedent which the court in the instant case sought to limit to its precise facts.

LIMITATION OF ACTIONS—REVIVAL OF BARRED STATUTORY RIGHTS.—The plaintiff was injured in October, 1917, while in the defendant railway's employ. In December, 1917, the federal government assumed control of the railroads, relinquishing it in February, 1920, by the Transportation Act, which provided, *inter alia,* that the period of federal control should not be computed as a part of the periods of limitation in actions against carriers arising prior to federal control. The plaintiff brought an action for damages in May, 1921. Upon demurrer to the complaint, *held,* for the defendant. The right of action was barred by the two year limitation in the Federal Employers' Liability Act. *Kannellos* v. *Great Northern Ry.* (Minn. 1922) 186 N. W. 389.

The ambiguity of the word "limitation" in the Transportation Act raises the distinction between common law and statutory rights and remedies. The artificiality of this distinction is indicated in (1921) 21 COLUMBIA LAW REV. 366. Statutes in derogation of the common law are strictly construed; thus where a statute creates a new right for a limited period it is held that the right itself is resricted and not merely the remedy. *The Harrisburg* (1886) 119 U. S. 199, 7 Sup. Ct. 140. Such a statute is treated as one of creation rather than of limitation, and bringing suit within the time limit as a condition precedent to the arising of liability. *The Harrisburg, supra.* Compliance with the statute is, therefore, required to be averred in the pleading. *Lapsley* v. *Public Service Corporation* (1908) 75 N. J. L. 266, 68 Atl. 1113. And the defendant need not set up the limitation affirmatively as is required where only the remedy is affected. *Atlantic Coast Line R. R.* v. *Burnette* (1915) 239 U. S. 199, 36 Sup. Ct. 75. The reason for the provision in the Transportation Act that the period of federal control should not be computed in determining the time of the limitation was that temporary stay laws or moratoria prevented creditors from maintaining actions during the war period. But this reason is not applicable in the instant case since the injured party, by express reservation in the President's Proclamation of 1917, was allowed his action as before. *West* v. *New York, N. H. & H. R. R.* (1919) 233 Mass. 162, 123 N. E. 621.

NEGOTIABLE INSTRUMENTS—WANT OF CONSIDERATION—BURDEN OF PROOF.—In an action by the payee against the maker of a promissory note, conflicting evidence as to consideration was introduced. There was a verdict for the plaintiff. On

appeal, *held,* for the plaintiff; the burden of proof being on the defendant, the decision as to facts would not be disturbed. *Woodland State Bank* v. *McKean* (Wash. 1922) 203 Pac. 939.

It is generally stated that the burden of proving a want of consideration in an action on a promissory note is on the defendant. *Spokane State Bank* v. *Pitner* (Wash. 1921) 194 Pac. 969; see (1917) 17 COLUMBIA LAW REV. 717. But in some jurisdictions, although the defendant has the burden of going forward with the evidence, the burden of proving the consideration by a preponderance of the evidence is on the plaintiff. See *Hudson* v. *Moon* (1913) 42 Utah 377, 380 *et seq.,* 130 Pac. 774. Some courts, failing to distinguish between the burden of going forward and the burden of proving, say that the "burden of proof" is on the defendant but shifts to the plaintiff when the defendant introduces evidence of lack of consideration. See *Doyle* v. *Doyle* (Cal. 1919) 186 Pac. 188, 189. If the defense is failure of consideration the burden of proof is on the defendant. See *Portuguese American Bank* v. *Schultz* (Cal. 1920) 193 Pac. 806, 808. But unlike failure of consideration, which is an affirmative defense, want of consideration, though it must be raised by the defendant, is a denial of the consideration presumed in a negotiable instrument. See *Ginn* v. *Dolan* (1909) 81 Ohio St. 121, 127, 90 N. E. 141. This difference in the nature of the two defenses is explicitly recognized even by courts which refuse to give effect to it procedurally. See *Shaffer* v. *Bond* (1917) 129 Md. 648, 658, 99 Atl. 973. The presumption of consideration is a rule of procedure which makes it unnecessary for the plaintiff to allege a consideration. As soon as the defendant has introduced enough evidence to overcome this presumption, the burden of proof should properly be on the plaintiff. The instant case does not follow this rule as the other view is firmly established in its jurisdiction.

PLEADING AND PRACTICE—PROCEDURE UNDER FEDERAL STATUTE ALLOWING EQUITABLE DEFENSES IN LAW ACTIONS.—In an action at law on a contract, the defendant pleaded a release under seal. The plaintiff replied alleging fraud in the procurement of the release. *Held,* for the plaintiff. (1) This defense is available to the plaintiff; (2) the submission to a jury of the issues of fact involved in the equitable defense, is discretionary with the court. *Plews* v. *Burrage* (C. C. A. 1st Cir. 1921) 274 Fed. 881.

Since 1915, by statute, equitable defenses are available in actions at law in the federal courts. (1911) 36 Stat. 1087, 1164, U. S. Comp. Stat. (1916) § 968 (Judicial Code § 274 b); am. by (1915) 38 Stat. 956, U. S. Comp. Stat. (1916) § 1251 b; *United States* v. *Richardson* (C. C. A. 1915) 223 Fed. 1010. The statute reads, "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court." The courts of the First Circuit allow the plaintiff to set up an equitable reply to a purely legal defense. *Manchester St. Ry.* v. *Barrett* (C. C. A. 1920) 265 Fed. 557. The Second Circuit holds *contra. Keatley* v. *United States Trust Co.* (C. C. A. 1918) 249 Fed. 296. The Supreme Court has not passed on the question. Since the statute was intended to simplify and speed litigation, the holding of the Second Circuit seems erroneous and the instant decision sound. It is everywhere discretionary whether questions of fact in an equity issue shall be submitted to a jury. *Pacific Coal & Transportation Co.* v. *Pioneer Mining Co.* (C. C. A. 1913) 205 Fed. 577. The statute did not attempt to merge law and equity. See *Union Pac. Ry. Co.* v. *Syas* (C. C. A. 1917) 246 Fed. 561, 565. Hence the decision which leaves the procedure of the trial of the equity issues the same as before the passage of the statute, is sound.